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FINAL DECISION OF THE COUNTY COUNCIL/BOARD OF APPEALS

RE: Zoning Reclassification Case No. 170

**APPLICANTS: Evergreen Business Trust and
Evergreen Development LLC**

LOCATION: 2014 Emmorton Road, west side MD Route 924

**REQUEST: Rezone 3.482 acres from R4 to B3, and rezone
30.45 acres from R4/B3 to B3 District**

**WHEREAS, the County Council/Board of Appeals has reviewed the file and
briefs in this matter; and**

**WHEREAS, the County Council/Board of Appeals has reviewed the record
developed by the Hearing Examiner and has considered the recommendation of
the Hearing Examiner; and**

**WHEREAS, the County Council/Board of Appeals has heard all final
arguments based on the evidence in the record;**

**NOW, THEREFORE, BE IT RESOLVED that the Harford County
Council/Board of Appeals, by affirmative vote of 5-2, rejects the Hearing
Examiner's recommended decision, dated June 20, 2008, and approves the
requested rezoning, based upon the findings of fact and conclusions of law as
hereinafter set forth in this Decision:**



APPLICANT:
Evergreen Business Trust

REQUEST: Requests to rezone 3.482
acres from R4 to B3, and 30.45 acres
from R4/B3 to B3

FINAL ARGUMENT: September 2, 2008

BEFORE THE

HARFORD COUNTY

ZONING BOARD OF APPEALS

Case No. 170

DECISION OF THE ZONING BOARD OF APPEALS

APPLICANT: Evergreen Business Trust

CONTRACT/PURCHASER: Evergreen Development LLC

LOCATION: south side of Plumtree Road between MD Route 924 and MD Route 24
Tax Map: 56 / Grid: 2C / Parcel: 60
First (1st) Election District

Present Zoning: R4 / Urban Residential District and
B3 / General Business District

west side of MD Route 924 south of Plumtree Road
Tax Map: 56 / Grid: 2D / Parcel: 56
First (1st) Election District
Present Zoning: R4 / Urban Residential District

REQUEST: Requests pursuant to Section 267-12A of the Harford County Code to rezone 18.46 acres from a B2 District to a R3 District; to rezone 30.45 acres from a R4/B3 District to a B3 District; and to rezone 3.482 acres from a R4 District to a B3 District.

TESTIMONY AND EVIDENCE OF RECORD

The parcels which are the subject of this application are known as the "Evergreen Business Trust" property, which is that parcel located at MD Route 924 and Plumtree Road, west side of MD Route 24, and consisting of 30.45 acres; and that parcel located at 2014 Emmorton Road, Bel Air, Maryland, on the west side of MD Route 24, adjoining the 30.45 acre parcel, and consisting of 3.482 acres. The subject parcels are split zoned R4 and B3. A requested zoning of B3 is made for each parcel. Both parcels are sometimes referred to hereinafter as the "subject property".

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First for the Applicant testified Clark Turner who identified himself as the President of Clark Turner, Inc., and a builder and developer in both residential and commercial markets. Mr. Turner identified himself as a consultant for the Applicant, Evergreen Development, LLC. The principals of the Applicant are Michael Klein and Philip Klein.

Mr. Turner will be involved in the expected development and design of the subject property. Mr. Turner described himself as having more than 30 years of experience in various phases of the real estate market, and has been involved in the development of approximately 25 projects within a mile of the subject property. Mr. Turner was offered and accepted as an expert real estate developer.

Mr. Turner described the 30.45 acre parcel (known as Parcel 60) as zoned R4, with the exception of a very small portion on its northeast corner at the intersection of Emmorton Road and Plumtree Road. Parcel 60 has frontage on MD Route 924, Plumtree Road, and MD Route 24. A small portion of Parcel 60 is wetlands, primarily located on the southwest corner of the property.

In 1997, stated Mr. Turner, the then owner of the property requested B3 zoning, which was not granted. During the 2005 comprehensive rezoning process the Harford County Council voted to rezone the parcel to B3/General Business. However, that legislation failed due to County Executive Craig's veto. The Council's action in 2005 included, furthermore, the smaller 3.482 acre parcel, which is sometimes known as Parcel 56, or the Snodgrass property.

Mr. Turner explained that current zoning allows approximately 462 residential condominium units together with 2 conventional units to be developed on parcel 60. However, in Mr. Turner's opinion, in today's market there is no demand for these type of residential structures. He believes there is most likely an existing over-supply. Furthermore, no apartments have been built in Harford County for a long time. Rents, stated Mr. Turner, do not justify the cost of construction. Accordingly, the market for apartments and condominiums has diminished.

Mr. Turner believes that in 1997 the Council was reluctant to approve a B3 zoning of the subject parcels given the existence of eleven single family dwellings along Plumtree Road, on the subject parcels' side of Plumtree Road. However, beginning in approximately 2000, Mr. Turner purchased and demolished those homes. A 30,000 square feet office building will now be built on the southeast side of Plumtree Road, on property previously occupied by six single family homes.

Mr. Turner explained that the commercial market has changed since 1997. He attributes this to the 'de-malling' of America, with new commercial projects having more of a main street type atmosphere. There has been a significant increase in the number of restaurants which are constructed in shopping areas. Harford County itself has seen a change from predominantly warehouse-type commercial development to higher-end retail and office use. BRAC¹ will also bring with it a demand for higher quality shops and markets.

¹ 2005 Defense Base Closure and Realignment Commission.

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New types of commercial development which combine high-end retail stores and service or office uses will take the place of traditional large box stores and shopping malls. The subject parcel is ideally suited for a commercial development of this model. BRAC will bring an additional 21,000 jobs to the County. Many of these individuals and their families will be looking for higher quality retail service providers. In 1997, the Harford County Council could not have foreseen these significant changes in the real estate market.

Mr. Turner, in addressing his holdings across MD Route 924 from the subject property, described his property as being more challenging, having more wetlands and not as accepting of the new retail service center model which Mr. Turner is describing. A critical mass of area is needed -- a large parcel which will provide area for the large users which are looking to move into the County. Furthermore, the subject property is surrounded by other commercial uses which also makes it ideal for this type of use.

On cross-examination, Mr. Turner estimated that approximately 65% of the people who will be moving to Maryland from New Jersey, as part of the BRAC process, will come to live in Harford County. This will have a huge impact on the County.

Mr. Turner envisions perhaps one large-footprint user on the subject property, together with a mixture of offices and retail users.

On cross-examination, Mr. Turner stated that BRAC changes are beginning to take effect in Harford County. These changes are happening along with a shift in the emphasis of the local economy from warehouse use to offices. He again stated that the Harford County Council could not have envisioned these changes.

Next for the Applicant testified Joseph M. Cronyn of Lipman, Frizzell & Mitchell, LLC. Mr. Cronyn has been a real estate market consultant and analyst for 15 years. He was offered and accepted as an expert real estate analyst.

Mr. Cronyn had been retained by the Applicants to review trends in real estate since 1997. This was done in order to compare current findings against an analysis which had been performed in 1997.

Mr. Cronyn explained that he was the author of a report entitled "Harford County Retail Growth Analysis, Projected Demand 1995 to 2020", which had been presented to the Harford County Department of Planning and Zoning in 1997 (Applicants' Exhibit 17).² The primary purpose of the study was to examine the supply/demand for retail growth; to determine the inventory of appropriately zoned available land; and to look at projected income and projected growth in order to determine future demand for retail space in order to appropriately plan for same.

² The actual report, being Applicant's Exhibit 17, is apparently undated.

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Among Mr. Cronyn's assumptions in that report were that one acre of undeveloped commercial land could be developed into approximately 10,000 square feet of floor space. The report also assumed that the Department of Planning and Zoning's projection of residential growth was correct and that sales per square foot would remain fairly constant.

Mr. Cronyn testified that this study was intended to give an idea of growth and demand. It can be inferred that the report was commissioned as a planning tool for the County. Mr. Cronyn did indicate that specifics of actual future sales and market could not be determined from the study. The study did anticipate that growth would be relatively constant with what had historically been seen in Harford County and that sales per square foot ratios would be relatively the same. Furthermore, the study anticipated that growth would be relatively constant as it had been in the past.

Mr. Cronyn's current study, which is entitled "Evergreen Business Trust Rezoning Retail Supply and Demand Issues" (Applicant's Exhibit 18), dated January 7, 2008, found that the 1997 report underestimated demand which has significantly exceeded anything that was anticipated. Moreover, the supply of commercially zoned land was also overestimated. In particular, the capacity of appropriately zoned land to hold new commercial development was overestimated. In fact, the availability of zoned land for commercial use was found not to be sufficient. Furthermore, demand is actually found to be 40% more than the 1997 report projected. Household growth is also approximately 7% higher than had been projected. One of the flaws which Mr. Cronyn found in his 1995-2020 report was that the original report did not take into account business to business purchasing. Mr. Cronyn estimates that, in 1997, future demand was underestimated by at least 40%.

Mr. Cronyn also noted that retail trends have changed over the years. In 1997 the number non-retail uses in shopping centers was relatively small. Now, up to 20% of the tenants in retail shopping centers are non-retail types of uses. Mr. Cronyn also testified that, based in part on this trend, that the amount of projected available retail space was overestimated in the 1995-2020 report. Furthermore, parcels of property, particularly smaller parcels, usually do not generate the percentage of floor area which was originally anticipated by the 1995 to 2020 report. Due to a number of reasons, 10,000 square feet of floor space cannot, in reality, generally be obtained from one acre of commercially zoned property. Furthermore, about 75% of all available parcels are less than 3 acres in size. He termed these available parcels as "convenience store kinds" of parcels and testified that these are not what the report had in mind when they were looking at the overall gross supply of retail in the County. Mr. Cronyn further believes that the retail development potential of properly zoned commercial property was overestimated by his 1995 to 2020 report by about 20%.

Mr. Cronyn explained that subsequent events have proven that the 1997 analysis was not correct and nobody anticipated the trends and how dramatic the changes would become from the assumptions used in 1997. Mr. Cronyn believes that the retail demand was under-forecast by at least 40% in 1997.

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Mr. Cronyn explained the evolution of the retail shopping center which is also addressed in Applicants' Exhibit 18 (Page 12). Mr. Cronyn now envisions that lifestyle centers, discussed at Page 12 of his report, are the types of retail/service centers which have evolved from the older regional, market place and power centers. A characteristic of lifestyle centers is that they tend to cater to a more affluent lifestyle. Mr. Cronyn believes a demand now exists in Harford County for service and retail centers which extend beyond traditional retail centers. These new centers - called 'lifestyle centers' - emphasize mixed use, offering offices, retail and entertainment uses together in order to get synergy amongst the uses. Moreover, a life-style center needs a large enough parcel of land to be able to contain the variety of these uses and their attendant parking. Moreover they further need to be located in an area with good traffic access, etc. These trends were not envisioned in 1997. A 'lifestyle center' was not known in 1997.

On cross-examination Mr. Cronyn indicated that he did not know if his 1997 report had been presented to the Harford County Council. It was given to the Department of Planning and Zoning. He assumed that it was prepared as input into the comprehensive rezoning process.

Next for the Applicant testified Kenneth Schmid, offered and accepted as an expert traffic consultant. Mr. Schmid testified that Harford County, between the 1994 Harford County Master Transportation Plan and the year 2000 Harford County Master Transportation Plan changed the designation of MD Route 924 from a minor urban collector to a minor arterial. Mr. Schmid opined that this change in classification means that the County perceived traffic in the area of MD Route 924 to have changed. Higher volumes now use MD Route 924. He believes this is a significant change, as MD Route 924 is carrying significantly more traffic than it was from the years 1994 to 2000.

Mr. Schmid has also observed increased intersection traffic on MD Route 924 and MD Route 24. In the year 2000 the State Highway Administration began making substantial changes to MD Route 24 by improving that roadway, in sections, with the addition of a third, middle lane, and sidewalks. That work is still in progress and is progressing towards the MD Route 924 and MD Route 24 intersection. Furthermore, Mr. Schmid understands that plans are now underway for significant changes to the MD Route 24/924 intersection. That intersection will be significantly upgraded, with MD Route 24 to carry through traffic and with on and off ramps to be added. These improvements should be completed within 2 to 2-1/2 years.

Furthermore, it had been envisioned that Tollgate Road would be fully completed and was to function as an urban collector. This has not yet taken place as Tollgate Road has not yet been completed.

Mr. Schmid has reviewed traffic volume reports for roads in the area, and has found that MD Route 24 carries from 18,000 to 21,000 cars a day.

Since 1997, Mr. Schmid observed traffic signals have been installed at Patterson Mill Road and MD Route 924, and at Plumtree Road and MD Route 924. Originally, all intersections on MD Route 24 were to be unsignalized. In fact, many of those intersections have been signalized since the construction of MD Route 24.

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Mr. Schmid had reviewed the 1997 to 2000 State Highway Administration Consolidated Transportation Plan. That Plan did not show any planned improvements to MD Route 924.

In 1998, for the first time, the State Highway Administration planned road improvements to MD Route 924. (See Applicant's Exhibit 26.) These improvements were then in the preliminary engineering stage. Mr. Schmid stated that no final decision had been made at that time to proceed with improvements to MD Route 924.

The 1999 to 2004 the State Highway Administration Consolidated Transportation Plan noted that preliminary engineering was to continue, with a planned improvement of adding a center turn lane to MD Route 924.

In the 2000 to 20005 State Highway Administration Consolidated Transportation Plan, for the first time, monies were actually budgeted for road improvements to MD Route 924. Mr. Schmid does not believe that any of these eventual improvements to MD Route 924 were known at the time of the enactment of the 1997 Comprehensive Plan.

Furthermore, Mr. Schmid does not believe that the eventual intersection improvements to MD Route 24/MD Route 924 were considered at the time of the 1997 Comprehensive Zoning. Mr. Schmid himself, in doing traffic studies throughout Harford County, was only made aware of those planned improvements within the past two to three years.

Next for the Applicant testified Sean Davis, a landscape architect and land planner. Mr. Davis was offered and accepted as an expert professional land planner.

Mr. Davis generally defined the neighborhood of the subject property as MD Route 24, Bel Air South Parkway, up to and including the Patterson Mill Middle/High School property, and running along the east side of Plumtree Road. He explained that the Planning and Zoning Staff defined the neighborhood somewhat differently than does the Applicant, finding a larger neighborhood. However, Mr. Davis explained that the Applicant is not arguing a change in neighborhood as the reason for its requested rezoning. It is arguing mistake only.

Mr. Davis explained that the 2004 Master Plan shows the property as a high intensity use.

In support of the Applicant's request, Mr. Davis noted a series of changes which he submits could not have been predicted by the County Council in 1997. In his opinion, the totality of these factors constitute a legal mistake by the County Council when they did not zone the subject property B3. Among those changes are the following:

- The subject property, at one time known as the Dahan property, was given permission for 462 unit apartment development in 1992. However, none of that development has taken place.
- Patterson Mill Middle and High School was not contemplated in the year 1997.

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- It was not known that the Snodgrass parcel would be under common ownership with that of parcel 60 as it is today.
- Plumtree Road in 1997 was bordered on the south side by separately owned residential units. These lots are now under common ownership and it now will be the location of an office building.
- Road improvements to MD Route 924 were not envisioned in 1997.
- It was anticipated in 1997 that Tollgate Road would be completed as part of the approval for the 462 apartments but it has not yet been completed.
- Retail forecast was both underestimated in retail demand and overestimated the supply of land and moreover did not foresee the change in retail formats.
- BRAC was not anticipated.
- Intersection improvements to MD Route 24/924 were neither known nor planned in 1997.

Among various factors which lead Mr. Davis to believe that a mistake was made in 1997 regarding the rezoning of the property is the fact that the various residential uses on the south side of Plumtree Road are under common ownership and being developed as an office building. This eliminates the conflict between the previous residential uses and the B3 zoning.

MD Route 924 is now classified as an arterial; additional traffic lights have been completed since 1997 on MD Route 924. Furthermore, commercial demand and use estimates made in 1997 were incorrect for a number of reasons. There is more demand than anticipated and less area is available. Environmental and other regulations have resulted in a smaller portion of available land used for actual floor space than was anticipated. As explained by Mr. Cronyn the retail format in the market is changing with larger retail centers, and with a higher grade and mix of service and retail use providers and centers.

In Mr. Davis's opinion the Harford County Council could not have known these factors in 1997 and therefore a mistake was made in not zoning the properties to a commercial district.

The subject property should be seen in a different light today than existed in 1997. This is a truly commercial property, says Mr. Davis, one which is more appropriately zoned commercial.

Mr. Davis also observed that virtually all of the properties surrounding the subject parcel are either roadways or are commercially zoned parcels. Mr. Davis, by referencing Exhibits 11, 12 and 13, demonstrated that the zoning of the subject parcels would "fill the hole in the donut" by having the last remaining non-commercial properties in that area rezoned.

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Mr. Davis opined that the property is best suited for commercial uses and is not well-suited for residential development. Furthermore, the fact that no development has taken place on the property since the 1992 approval indicates that the most appropriate zoning for the property is not residential.

Mr. Davis then reviewed the Limitations, Guides and Standards of the Development Regulations, § 267-9I, and found no negative impact.

On cross-examination Mr. Davis again stated there will be no negative impact on traffic as the developer will be required to mitigate any impact by local adequate public facilities legislation. The developer must mitigate traffic impact if he wishes to proceed with his development.

Mr. Davis again explained that in his opinion the factors which have changed since 1997 could not have been anticipated in 1997 by the Harford County Council. He also assumes, however, that the Council was aware of public records, including the Legg Mason study prepared by Mr. Cronyn in 1997.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune. Mr. McClune stated that both the R4 and B3 zones are consistent with the Harford County Master Land Use Plan designation for this area.

Mr. McClune said the Department finds no justification for a finding of mistake, and therefore recommend against the requested rezoning. He also noted that the Patterson Mill School property was purchased prior to 1997 and was identified prior to that time as a potential site for a school.

Mr. McClune stated that the Planning Advisory Board recommended denial of the requested rezoning. He stated that, generally, he believes that the Council was generally aware of the Legg Mason Retail Study in 1997. In 1997 the need for the MD Route 924/24 intersection improvements was known, but the solution had not been designed and funded and planned in 1997.

Mr. McClune explained that the 1997 Legg Mason Study was not to have been used as a tool to rezone individual properties, but was more of a general guide to future growth and demand.

Next in opposition testified Michael J. Klein, who is a partner in the Klein's Family Supermarkets. The Klein's Family Supermarkets operates the approximately 52,000 square foot market in the Festival of Bel Air, located approximately 300 yards of the subject property.

Mr. Klein believes that no error had been shown by the Applicant, and the request should be denied. Mr. Klein also suggested that the Applicants' arguments that demand in the County has been steadily increasing, and in fact increasing more than predicted, are incorrect based on the sales at the Klein's Family Supermarket at the Festival.

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Mr. Klein explained that in the year 1997 the Festival store of Klein's had 21.7 Million Dollars in sales, while in the year 2005 had \$25.1 Million in Sales. He translated the sales per square foot of \$418.00 in 1997; and \$483.00 in the year 2007. As the Consumer Price Index has increased 30.95% from 1997 to 2007, sales at the Festival Store have only increased approximately 15%. Mr. Klein, accordingly, believes that sales have remained stagnant or actually decreased in the area.

The Festival Shopping Center itself has undergone constant change in occupancy over the years. Klein's is, probably, the longest lasting tenant and is the anchor tenant at Festival of Bel Air. Mr. Klein also indicated that his store has lost customers as traffic at the Festival store has decreased over the years.

Next testified Edward C. Maulden, II. Mr. Maulden and his family are residents of Laurel Oak Drive. He has lived in the area for 9 years. He and his family are in favor of the requested zoning and look forward to an upgraded retail environment in the area.

APPLICABLE LAW:

Section 267-12A of the Harford County Code states:

"A. Application initiated by property owner.

- (1) Any application for a zoning reclassification by a property owner shall be submitted to the Zoning Administrator and shall include:*
 - (a) The location and size of the property.*
 - (b) A title reference or a description by metes and bounds, courses and distance.*
 - (c) The present zoning classification and the classification proposed by the applicant.*
 - (d) The names and addresses of all persons, organizations, corporations or groups owning land, any part of which lies within five hundred (500) feet of the property proposed to be reclassified as shown on the current assessment records of the State Department of Assessments and Taxation.*
 - (e) A statement of the grounds for the application, including:*

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- [1] *A statement as to whether there is an allegation of mistake as to the existing zoning and, if so, the nature of the mistake and facts relied upon to support this allegation.*
- [2] *A statement as to whether there is an allegation of substantial change in the character of the neighborhood and, if so, a precise description of such alleged substantial change.*
- (f) *A statement as to whether, in the applicant's opinion, the proposed classification is in conformance with the Master Plan and the reasons for the opinion.*
- (2) *Concept plan. A concept plan shall be submitted by the applicant at the time the application is filed. The concept plan shall illustrate the proposed general nature and distribution of land uses but need not include engineered drawings."*

The Applicant requests a change in the zoning of the property. An initial presumption exists in the determination of whether any such request should be granted:

"It is presumed that the original zoning was well planned, and designed to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood changed to an extent which justifies the amendatory action." See Wakefield v. Kraft, 202 Md. 136 (1953).

In order to find mistake, there must be evidence that the assumptions or premises relied upon by the County Council were invalid. This constitutes more than the exercise of bad judgment based on *complete and accurate* information.

"The term error, as it is used in zoning law, does include the failure to take into account projects or trends reasonably foreseeable of fruition in the future. But in order to establish error there must be evidence to show such developments were not, in fact, or could not have been, taken into account so that the Council's actions was premised on a misapprehension." See Coppolino v. County Bd of Appeals of Baltimore County, 23 Md. App. 358 (1974) at 372.

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In Boyce v. Sembly, 25 Md. App. 43 (1975) mistake or error can be shown by establishing facts that show that

“the Council failed to take into account then existing facts, projects or trends which were reasonable foreseeable of fruition in the future, that the Council’s action was premised initially upon a misapprehension.”
Boyce v. Sembly at 50.

Moreover, *“because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning.”* Boyce v. Sembly at 51-52.

In considering an:

“. . . application for reclassification, there must first be a finding of substantial change to the character of the neighborhood or a mistake in the comprehensive plan.” See Hardesty v. Dunphy, 259 Md. 718 (1970).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Evergreen Development, LLC (sometimes hereinafter referred to as “Applicant” or “Evergreen”), is the contract purchaser of approximately 4 acres of prime real estate located in the Old Emmorton area, close by and northwest of the Festival of Bel Air Shopping Center, and lying between MD Routes 924 and 24. A great majority of the property is zoned R4, with a small portion at the intersection of Plumtree Road and MD Route 24 zoned B3. R4 zoning designation allows for intensive residential development. Interestingly, a portion of the larger parcel (not subject to this application) lies to the west of MD Route 24, and is the site of the only uncompleted portion of Tollgate Road.

The Applicant is requesting that the residentially zoned portion of these parcels be rezoned to B3. The Applicant does not argue change in neighborhood as a basis for its piecemeal request. Rather, Applicant argues the Harford County Council was in error in the 1997 comprehensive, County-wide zoning by zoning the parcels R4, when the most appropriate zoning was, actually, B3.

In making its argument for mistake Applicant points to a variety of circumstances, which they contend the totality of which constitutes a mistake in the legal sense. The totality of these circumstances were previously discussed in this opinion. Several factors, however, are vigorously identified by Applicant as determinative evidence of mistake.

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The Applicant states that this case is not that dissimilar from Pressman et al. v. Mayor and City Council of Baltimore et al. 222 Md. 330 (1960). In Pressman the evolution of shopping areas from commercial strip centers to shopping centers was identified by the Court as a significant factor in upholding the rezoning of this property. Moreover, the Court stated that “(w)hether this should be regarded as an error in original zoning or the result of changed conditions may be a matter of a choice of words or of approach.” Pressman at 339. The Court further noted that there was no serious controversy in the Pressman case over the proposition that commercial strip zoning had proved undesirable under the then existing conditions. It was noted that however desirable commercial strip zoning along arterial highways may have initially appeared that there was ample evidence to support the view that it has not stood the test of time and experience. Likewise, in the instance case, the uncontradicted testimony of the Applicant’s expert, Clark Turner, identified shopping needs as having evolved into “lifestyle centers”. Moreover, it is uncontradicted that a life-style center requires, by economic necessity, a large tract of land in order to make the construction economically feasible.

The Court of Appeals also found that the lack of anticipation of trends of development or alternatively, as a result of changes in development trends which occurred since the comprehensive rezoning, whether anticipated or not, the existing zoning was found to be in error. The Court again in this case noted that there must be a showing of error in the comprehensive rezoning when made or a subsequent change of conditions, or both.

Moreover, the Court of Appeals in Rohde et al. v County Board of Appeals for Baltimore County and Ortell Realty, Inc. 234 Md. 259(1964) observed that “(i)t is sometimes difficult to say whether some evidence shows original error or change in conditions, and it may not be necessary to resolve the question.” Rohde at 267. It is clear from the testimony of the Applicant’s experts, Mr. Turner and Mr. Cronyn, that the life-style center concept which incorporates retail, office and entertainment in one project is a relatively new concept and was neither identified nor anticipated by the County Council during the 1997 comprehensive rezoning.

Applicant, however, identifies additional areas which it contends also show mistake during the 1997 comprehensive rezoning. Applicant presented Joseph M. Cronyn who was accepted as an expert real estate analyst. Mr. Cronyn was the author of a report commissioned by Harford County to examine retail growth and projected demand. He formally presented this report to the Harford County Department of Planning and Zoning in 1997. Anthony McClune, of Department of Planning and Zoning, indicated that the Council was generally aware of this report.

This report’s conclusion was that there was a sufficient supply of zoned land for commercial use to satisfy the projected growth in the rate of demand through the end date of the report; i.e. 2020. Mr. Cronyn admitted that this analysis, while generally correct given its limitations, significantly underestimated demand as well as significantly overestimating supply of available commercially zoned property.

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Mr. Cronyn opined that the retail development potential of properly zoned commercial property was overestimated by about 20% and demand was underestimated by at least 40%. Moreover, about 75% of all the available parcels were less than three acres in size; a size which he stated was more conducive for convenience stores rather than any commercial project of significance. The fact that the majority of commercially zoned property was contained in small parcels was not specifically noted in the 1997 report. Inasmuch as the County Council was aware of this report and the fact that the Harford County Government had paid for this analysis, it logically follows that the Council considered this flawed commercial analysis as a guide when conducting the 1997 comprehensive rezoning.

This Board is aware that the Zoning Hearing Examiner reached a conclusion that sufficient evidence of mistake was not presented by the Applicant and therefore has recommended that we deny this requested rezoning. We disagree with this conclusion and further find that, based upon the totality of the evidence presented by Applicant, that the County Council did, in fact, make a mistake in 1997 by not rezoning the subject property as B3.

We have examined the appellate cases cited by the Zoning Hearing Examiner. In particular, we find that Brenbrook Construction Co. v. Dahne, 254 Md. 443 (1968) to be inapposite to the situation presented here. In the Brenbrook Construction Co. the evidence presented therein consisted primarily of bald allegations which were not substantiated by any underlying facts. This is just simply not the case in the matter before us.

Moreover, our independent review of the testimony of Applicant's expert planner, Sean Davis, leads us to accept his opinion that a legal mistake was made in the 1997 comprehensive rezoning in relation to the subject property. Moreover, the conclusion that the Applicant has solely requested rezoning in order to receive higher profits which would result from such a reclassification, is simply also not borne out by the evidence. In fact, the record is devoid of any discussion concerning the relative profitability of various potential development schemes for the subject property. Accordingly, this Zoning Board of Appeals reaffirms its conclusion that a legal mistake was made in the 1997 comprehensive rezoning regarding the subject property.

People's Council, during final argument succinctly phrased the issue before us as follows: Would the County Council have acted differently in 1997 if it knew then what it knows now? Based upon the record before the Zoning Hearing Examiner, the Zoning Board of Appeals must answer in the affirmative. Accordingly, the Zoning Board of Appeals concludes that a legal mistake was made during the 1997 comprehensive rezoning regarding the subject property.

Having found that a mistake was made allows, but certainly does not mandate, the rezoning of the subject property. Nevertheless, based upon the totality of the evidence, including but certainly not limited to, the evolution of shopping from malls to life-style centers, we believe that the requested rezoning is appropriate.

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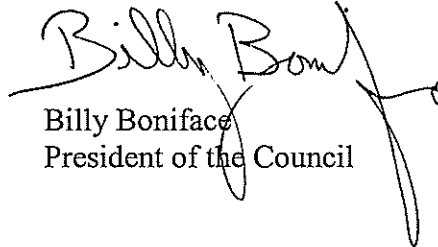
The Board assumes, like the Zoning Hearing Examiner in this case, and the Court of Appeals in Pressman, et al. v. Mayor and City Council of Baltimore, et al. that the Applicants deemed it *"to their advantage to seek and obtain the rezoning and it may very well be. Certainly, they would be unlikely to venture the large amounts of money required for the establishment of shopping centers (life-style centers in this case) unless they so believed."* Pressman, at 339.

Like in Pressman, it is the very research that the Applicant did to satisfy themselves that a public demand for a life-style center which they desire to construct which also shows that the requested rezoning will be beneficial to the public and to the neighborhood. Moreover, the record is abundantly clear that the vicinity of the subject property is zoned primarily for commercial and office use and interestingly, the only testimony from a member of the "public at large", a resident of the vicinity, testified in support of the project as being desirable. B3 zoning of the subject property does fill in "the hole of the doughnut."

CONCLUSION:

Accordingly, it is the decision of the Zoning Board of Appeals that the proposed rezoning of the subject property to B3 is hereby GRANTED.

COUNTY COUNCIL OF HARFORD COUNTY


Billy Boniface
President of the Council

September 9, 2008

Final decision of the County Council/board of Appeals may be appealed with the required fees to the Circuit Court for Harford County on or before **OCTOBER 10, 2008**. Filing instructions may be obtained from the Clerk of the Circuit Court.